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No. 86-939

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ENERGY TRANSPORTATION SYSTEMS INC.,
Petitioner,

v.

STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY BRIEF

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4544
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF

In their oppositions to ETSI Pipeline Project's ("ETSI") petition for a writ of certiorari,[1] respondents

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[1] The petition for certiorari was originally filed in the name of Energy Transportation Systems Inc., a Delaware corporation. On January 27, 1987, ETSI, a Delaware joint venture and the party that contracted with the Secretary of the Interior in the matter at issue, requested that it be substituted for Energy Transportation Systems Inc. as the real party in interest pursuant to Fed. R. Civ. P. 17. ETSI explained that, although the two entities had been treated interchangeably by the parties to this litigation, substitution would be desirable because the corporation has recently been dissolved. Indeed, in their opposition, respondents acknowledge that, in the litigation below, Energy Transportation Systems Inc. was "named to represent [ETSI Pipeline Project] as a party . . . ." Brief for Respondents, Kansas City Southern Railway, *et al.* at 5-6, 8. If the Court were to conclude for any reason that substitution of the joint venture were not appropriate, the corporation should be permitted to go forward. Under Delaware law, a dissolved corporation continues for a minimum of three years for purposes

make essentially five contentions: (1) that in 1944 the Secretary of the Interior twice sought and was twice denied the statutory authority he has claimed in this case; (2) that this case is moot; (3) that the Eighth Circuit's decision in any event affects only the ETSI contract; (4) that denial of water marketing authority to the Secretary of the Interior may be of little consequence inasmuch as the Secretary of the Army is currently considering broadening his own authority to market such water; and (5) that no deference is due the Secretary of the Interior's construction of Section 9 of the Flood Control Act because the Secretary had no authority even to construe that section. None of these contentions is correct, as we briefly explain below.

1. Respondents contend that, in entering into the ETSI contract, the Secretary of the Interior has sought to exercise authority that was twice denied him at the time Congress passed the Flood Control Act of 1944. This contention is not only inconsistent with the provisions of the Pick-Sloan Plan which Congress adopted in Section 9(a) of the Flood Control Act and with Congress' reaffirmation of the Secretary's authority in 1982; the contention is also refuted by the very legislative history on which respondents rely.

Respondents' first suggested instance in which Congress denied the Secretary the authority he has exercised here was a language change proposed by the then-Secretary of the Interior Harold Ickes. In a letter proposing the amendment, the Secretary explained briefly that the provisions of Section 6 of the House bill (ultimately Section 8 of the Act) "are not entirely apt in their relation to the various technical features of the Federal reclamation laws." *Flood Control: Hearings on H.R. 4485 Before a Subcomm. of the Senate Comm. on Commerce*, 78th

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of prosecuting and defending lawsuits. Del. Code. Ann. tit. 8, § 278. Thus, the dissolution should have no bearing on the petition for certiorari.

Cong., 2d Sess. 313 (1944) ("1944 Senate Hearings"). The House version the Secretary referred to expressly authorized Interior "to prescribe regulations" for the use of the storage available for irrigation at Corps reservoirs. In his oral testimony, the Secretary explained that he was seeking the amendment because Interior carries out its reclamation function through contracts rather than regulations:

> *The revision of Section 6 recommended in my report . . . is purely for purposes of clarification.* That section as it now stands [House Section 6] provides for the application of the Federal reclamation laws to the irrigation features of Army reservoir projects. However, *it is not drafted in a way that ties in with the basic provisions of the reclamation laws . . . as though they involved merely the imposition of regulations, whereas in truth they are largely designed to authorize a system of contractual relationships.* It disregards the problem of allocating costs for multiple-purpose facilities serving other uses in addition to irrigation.

Id. at 458 (emphasis added). The Conference Report explained that the amendment was adopted for precisely the reason offered by the Secretary. H.R. Rep. No. 2051, 78th Cong., 2d Sess. 7 (1944). Nothing in this amendment indicates a congressional intent to limit the Secretary's authority over irrigation storage.

The second bit of legislative history respondents grasp at is the unsuccessful attempt by Secretary Ickes to retain for Interior the *exclusive* authority to market water for domestic and industrial purposes at any federal water project utilized even in part for irrigation. *See* 1944 Senate Hearings at 312-313. The debate in the House reveals, however, that what ultimately became Section 6 was not intended to limit Interior's authority, but simply to extend *to the Corps* a power that Interior's Bureau of Reclamation had long enjoyed. *E.g.*, 90 Cong. Rec. 4125 (1944) (remarks of Rep. Whittington); 90 Cong. Rec. 4133 (1944) (remarks of Rep. Curtis).

ETSI has not found any support for the claim that, in granting *the Corps* authority to market the storage it regulated, Congress intended to deny *the Secretary* his traditional authority to market unutilized irrigation storage for other purposes. Such a reading is irreconcilable with Secretary Ickes' contemporaneous understanding that Section 8 was intended to apply reclamation law "in all pertinent respects" to irrigation storage at Corps reservoirs. 1944 Senate Hearings at 458.

2. Although they have not cross-petitioned for certiorari on the issue of the lower courts' express determination that this case is not moot,[2] respondents here contend that "there is a real question whether this case presents any live controversy as to ETSI." Brief for Respondents, Kansas City Southern Railway, *et al.* at 8; *see also* Brief for Respondents, States of Missouri, *et al.* at 6. Certiorari should be denied, they argue, because ETSI terminated the *state* water use permit that underlay its now-enjoined federal contract.

This argument represents a classic attempt at bootstrapping. Having succeeded in enjoining ETSI's contract, respondents now argue that consequences flowing inevitably from that injunction render the controversy moot. That, of course, is not the law.[3] In any

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[2] As noted in ETSI's Petition for Certiorari, the mootness issue was separately briefed and decided in the courts below after Respondents filed their "Suggestion of Mootness" in the Court of Appeals. *See* ETSI Pet. 17 n.24. The Court of Appeals remanded the case to the district court for factual findings. Following a hearing, the district court rejected, as a matter of fact, respondents' mootness contentions. That decision was subsequently affirmed by the Court of Appeals.

[3] In *County of Los Angeles v. Davis*, 440 U.S. 625 (1979), this Court held that, when a party voluntarily suspends or terminates an allegedly improper activity, a judicial challenge to the legality of that activity is moot only if: (1) the alleged violation cannot

event, as the courts below correctly found, while ETSI terminated its state water use permit several months after the district court enjoined use of its federal contract, it did so to avoid a large payment obligation to South Dakota.[4] ETSI's *federal* contract has not been abandoned or terminated and, absent the Eighth Circuit's injunction, could be revived. Moreover, this federal contract, a valuable asset of ETSI's, is assignable. Even if ETSI permanently abandoned its pipeline plans, it could nevertheless assign its rights under the contract to others.[5] Thus, the legality of the contract with Interior remains an issue of concrete, ongoing concern to ETSI.

3. Respondents further claim that this case is not worthy of review because it affects only the ETSI contract. Undisputed record facts flatly contradict this assertion.

The Secretary has approved three other substantial contracts for water from Missouri River main stem reservoirs, one of which—like ETSI's contract—was executed after the Memorandum of Understanding ("MOU") between Interior and the Corps had expired. Regardless of when they were executed, however, all of the contracts explicitly invoked Section 9(c) of the Flood Control Act

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reasonably be expected to recur; and (2) events have "completely and irrevocably eradicated" the effects of the alleged violation. *Id.* at 631. The courts below concluded that neither prong of the *Davis* test was satisfied.

[4] Respondents cite "Mootness Exhibit 10" as evidence that ETSI terminated its state permit "for other reasons" than the instant litigation. *See* Brief for Respondents, States of Missouri, *et al.* at 6. The cited Exhibit, however, is merely a copy of ETSI's letter to South Dakota terminating the permit; it indicates no "other reason" for termination except the payments due.

[5] Although the assignee would also need a state permit, South Dakota has clearly indicated its interest in agreeing to such a permit through its filings in this case.

as the source of the contracting authority. That provision grants authority exclusively to Interior; it has nothing to do with the Corps. If these existing contracts are not authorized by Section 9(c), they are not valid at all.[6] Moreover, the uncertainty over the Secretary's authority engendered by this litigation has undoubtedly discouraged others from renewing or going forward with additional contracts. *See* Brief for the State of Montana as Amicus Curiae at 2-3.

Furthermore, respondents' litigating posture below belies their present contention that the Secretary's water marketing authority is of little consequence. Until filing their "Suggestion of Mootness" in the Court of Appeals, respondents strongly argued that this case concerned the legality not only of the ETSI contract for 20,000 acre-feet of water, but also of Interior's entire "water marketing program, plan and policies" including a plan to "shift the use of *one million acre-feet* of water from authorized project purposes." *See, e.g.*, Plaintiff's Controverted Issues at 2-3 (Apr. 26, 1984) (emphasis added). In light of their prior posture, they cannot now credibly argue that the issue presented before the Court is insignificant and affects only ETSI's contract.

4. Respondents next assert that the Department of the Army is reconsidering its current 50,000 acre-foot guideline for "surplus water" marketing. While this assertion is apparently true, it has marginal, if any, relevance to this case. The Missouri River Division of the Corps, for example, has prepared a draft proposal to redefine "surplus water" to allow greater access to water for new uses, but no action on that or any other proposal appears imminent. At present, it is sheer speculation that the Corps will go forward and, if it does, that it can successfully defend against the serious challenges it would face concerning the legality of such action under

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[6] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169 (1962); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

Section 6 of the Flood Control Act. *See* ETSI Pet. 19-20. This Court should not base a decision to grant or deny certiorari on the mere possibility that an agency may change its policy sometime in the future.[7]

Moreover, the *Corps'* water marketing policy under Section 6 has little bearing on the central issue of this case, which is *Interior's* water marketing authority under Section 9 of the Flood Control Act. In that Act, Congress gave the two agencies concurrent jurisdiction over the water; Congress did not condition Interior's authority on the Corps' decision to market more or less water from the reservoirs. Nevertheless, under the Eighth Circuit's decision, Interior will have *no* authority to market the water.

5. The Eighth Circuit in this case held that the Secretary of Interior's "assertion of . . . authority" over Oahe water was "beyond his statutory mandate and therefore not entitled to judicial deference." ETSI Pet. App. 33a-34a. ETSI showed in its petition that acceptance of the Eighth Circuit's reasoning would completely subvert this Court's *Chevron* deference rule,[8] inasmuch as virtually every agency construction with which a court disagrees could be deemed to fall outside the agency's "statutory mandate." ETSI Pet. 25-30. Respondents do not defend the Eighth Circuit's reasoning; they instead contend that "[u]nlike this case, in [*Chevron* and its progeny] the statute under review unequivocally empowered the agency offering the interpretation to administer the provision in question." Brief for Respondents, Kansas City Southern Railway, *et al.* at 14 (footnote omitted). Re-

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[7] Indeed, the Lower Basin States, including Iowa and Missouri, have vigorously opposed any change in the Corps' treatment of "surplus water" on both statutory and policy grounds. It is inconsistent for respondents to contend that this case has little consequence because the Corps may one day change its marketing policy when they elsewhere contend that any such change would be unlawful.

[8] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

spondents' position apparently is that where an agency construes a statutory provision that it clearly has no authority to construe, the agency's construction of that statutory provision is not entitled to deference. This may be a sound position, but it has nothing to do with this case.

The 1944 Flood Control Act is unquestionably a statute that the Secretary of the Interior is charged with enforcing; under Section 9(c) of that Act, "the reclamation . . . developments to be undertaken by the Secretary of the Interior . . . shall be governed by the federal reclamation laws . . . ." There can be no doubt that the Secretary is authorized to construe the meaning of the words "reclamation developments" in Section 9(c) of the Act, that he has construed those words to include the Oahe irrigation water here at issue, and that the governing reclamation laws permit him to market that water. Neither the Eighth Circuit's "statutory mandate" rationale nor respondents' suggestion that the Secretary had no authority to construe Section 9(c) at all[9] can

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[9] Respondents also make two other subsidiary points regarding the Court of Appeals' refusal to defer to the Secretary's construction of the Flood Control Act. They first contend that the Secretary's construction is based "solely on an Interior Solicitor's [1974] memorandum." Brief for Respondents, States of Missouri, *et al.* at 9. That is not true. Both Interior and the Corps expressed this same construction in their 1944 testimony on the Flood Control Act, 1944 Senate Hearings at 458, 747; it was a clearly-articulated principle in the Pick-Sloan Plan, H.R. Doc. No. 475, 78th Cong., 2d Sess. 3-4 (1944); S. Doc. No. 191, 78th Cong., 2d Sess. 8, 11 (1944); the Assistant Solicitor of Interior advised Congress of this interpretation in 1957, *Missouri Basin Water Problems: Joint Hearings Before the Senate Comm. on Interior and Insular Affairs and the Senate Comm. on Public Works*, 85th Cong., 1st Sess., Part 2, at 313-353 (1957); the Corps and Interior jointly advised Congress of this interpretation in 1975 when they executed the MOU, *Missouri River Basin Industrial Water Marketing: Hearing Before the Subcomm. on Energy Research and Water Resources, Senate Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess.,

reconcile the lower court's decision with the clear contrary command of *Chevron* and its progeny.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JAMES A. HOURIHAN, P.C.*
WALTER A. SMITH, JR.
MARY ANNE SULLIVAN
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4544
Counsel for Petitioner

* Counsel of Record

Part 1, at 5-6 (1975); and Interior and the Corps reaffirmed this understanding in testimony on the Reclamation Reform Act of 1982, 128 Cong. Rec. S8476-S8480 (daily ed. July 16, 1982).

Second, the State respondents claim that deference cannot logically be given to an agency where, as here, "one enabling act governs two agencies, whose counsel reached opposite conclusions." Brief for Respondents, States of Missouri, *et al.* at 10. But the two agencies in this case certainly did *not* reach opposite conclusions regarding the Secretary of the Interior's authority under Section 9. Rather, as ETSI explained in its petition, both of the agencies charged with administration of the Flood Control Act have taken the position—and have reported to Congress—that the Secretary of the Interior *has* authority under Section 9 of the Act to conduct the water marketing program here at issue. *See* ETSI Pet. 13-16.